THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0764, State of New Hampshire v. Andrew S. Cook, the court on January 10, 2008, issued the following order:

The defendant, Andrew S. Cook, appeals his conviction in superior court on charges of simple assault, see RSA 631:2-a (2007), arising out of an incident of domestic violence. He argues that the trial court erred by admitting evidence of another domestic abuse incident, which was the subject of separate criminal charges, upon the basis that he had "opened the door" to such evidence. We affirm.

The "opening the door" doctrine known as the doctrine of specific contradiction allows a party to introduce evidence that would otherwise be inadmissible if its introduction is needed to correct a misleading advantage gained by an opponent. See State v. White, 155 N.H. 119, 124 (2007); State v. Morrill, 154 N.H. 547, 550 (2006). The rule generally prevents a party from successfully excluding unfavorable evidence, and then selectively introducing advantageous evidence for the jury to consider out of context. See Morrill, 154 N.H. at 550. We review the admission of evidence pursuant to this doctrine for an unsustainable exercise of discretion. See id.

The incident which is the subject of the defendant's convictions occurred on April 1, 2004, when the defendant threw the victim to the floor in his residence and choked her. The victim did not report the incident until July 10, 2004. A second incident occurred on June 17, 2004, when the defendant allegedly threw the victim into a closet, pointed a loaded pistol at her head, and threatened to kill her. Prior to trial, the trial court precluded evidence of the June 17 incident pursuant to New Hampshire Rule of Evidence 404(b).

At trial, the victim testified that she did not immediately report the April 1 incident out of fear. The defendant responded with evidence that he terminated the relationship on June 18, 2004, that the victim was extremely distraught and accused the defendant of having a relationship with another woman, and that the victim reported the April incident only after discovering the defendant's new girlfriend. The trial court found that the defendant's attempt to establish a motive to fabricate the charges "opened the door" to the June 17 incident, and permitted the State to recall the victim to testify as to the June 17 incident.

Prior to the victim's rebuttal testimony, the defendant called an acquaintance of the victim who testified that, after the defendant had terminated

their relationship, the victim spoke often with her about the defendant's new relationship, and that the victim was upset during these conversations. Upon cross-examination, the trial court allowed the State to elicit that the victim also told her about the June 17 incident, and that she was upset about that incident as well. On appeal, the defendant does not challenge the trial court's decision to allow the acquaintance to testify regarding the June 17 incident. Instead, he argues that "even if the court properly admitted [the acquaintance's] testimony, it erred in admitting [the victim's], and that error requires reversal." We disagree.

To establish an unsustainable exercise of discretion, it is the defendant's burden to demonstrate that the trial court's decision was clearly unreasonable to the prejudice of his case. See id. Here, the victim's testimony was cumulative to the testimony of the acquaintance, whose account of the victim's conversations with her was consistent with the victim's testimony regarding the details of the June 17 incident. We disagree with the defendant that the mere fact the victim provided greater detail than the account the jury had heard from the acquaintance rendered the victim's testimony prejudicial. Cf. State v. Steed, 140 N.H. 153, 156 (1995) (harmless error where challenged evidence was cumulative to other evidence the defendant did not contest on appeal). Because the victim's testimony regarding the June 17 incident was cumulative, we conclude that the defendant has not established an unsustainable exercise of discretion. See In the Matter of Thayer and Thayer, 146 N.H. 342, 348 (2001).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk